89-358 (1)

Supreme Court, U.S.
FILED
JUL 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1989

Gary S. Gill,

Petitioner,

v.

United States of America,
and Howard L. Hoy, Revenue
Officer, Internal Revenue Service,

Respondents

On Writ of Certiorari to the
United States Court of Appeals
For the Eighth Circuit

Petition For Writ of Certiorari

Gary S. Gill
Suite 614 Merle Hay Twr.
3800 Merle Hay Road
Des Moines, Iowa 50310
Tele: (515) 270-1143

Preliminary Matter

Questions Presented

Did the Court of Appeals err in failing to uphold the Fourth and Fifth Amendment to the United States Constitution prohibiting the government from acquiring the Petitioner's, a sole proprietorship, papers and documents?

Did the Court of Appeals err in disallowing Petitioner's clai of attorney/client privileges regarding information obtained in confidential communication with his clients?

Did the Court of Appeals err in granting the government's Motion for Judgment on the Pleadings, wherein evidence was presented and testimony taken, and was not a proper remedy under the Federal Rules of Civil Procedure?

Table of Contents

	Page:
Questions Presented	i
Opinions Below	v
Jurisdiction	v
Constitutional Provisions, Statutes and Rules Involved	v
Statement of the Case	1
Reasons for Granting the Writ	3
Conclusion	12
Proof of Mailing Affidavit	14
Proof of Service	15
Appendix A	16
Appendix B	21

Table of Authorities

Page:

Bellis v. United States, 417 U.S. 85, 94 S. Ct. 2179, 2182, 40 L. Ed. 2d 678 (1974) 4

Boyd v. United States, 116 U.S. 616, 68 S. Ct. 524, 29 L. Ed. 746 (1886) 4, 6, 12

Fisher v. United States, 425 U.S. 391, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976) 4, 7, 8

National Labor Relations Board v. Weirton Steel Co., 146 F. 2d 144 (C.A. Third - 1944) 9

National Metropolitan Bank v. United States, 323 U.S. 454, 65 S. Ct. 354, 89 L. Ed. 383 (1945) 9

United States v. Doe, 465 U.S. 605, 104 S. Ct. 1237, 1245, 79 L. Ed. 552 (1984) 4

United States v. G. & G. Advertising Co., et al, 762 F. 2d 632, 634 (C.A. - 8th) (1985) 5

United States v. Harrison, 653 F. 2d 359, 361, (C.A. - 8th) (1981) 5

Constitutional, Statutory and Rule Provisions Page:

United States Constitution, Amendment 4 v

United States Constitution, Amendment 5 vi

28 U.S.C. Sec. 1254(1) v

Sec. 622.10, Code of Iowa 6,

Sec. 602.10112, Code of Iowa 6,

U.S. Sup. Ct. Rule 17(1)(c), 28 U.S.C.A. 4

Fed. R.C.P. 12(c) 8,10,11,12

Opinions Below

The opinion of the Court below (Appendix A, infra p. 14) is unreported. The opinion of the District Court below (Appendix B, infra, p. 17) was not reported.

Jurisdiction

The judgment of the Court below (Appendix A, infra, p. 14) was entered on April 28, 1989. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Constitutional Provisions, Statutes and Rules Involved

1. The Fourth Amendment, United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers and effects effects, against unreasonable searches and seizures, shall shall not be violated, and no Warrants shall issue, but upon probable cause, supported by

> Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The Fifth Amendment, United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. Section 622.10, Code of Iowa which provides:

> "A practicing attorney . . . who obtains information by reason of the person's employment . . . shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted the person in the person's professional

capacity . . ."

4. Section 602.10112(4), Code of Iowa which provides:

> "It is the duty of an attorney and counselor:
>
> . . .
>
> 4. To maintain inviolate the confidence, and, at any peril to the attorney or counselor to preserve the secret of a client. . . ." (emphasis added by this writer)

5. Federal Rule of Civil Procedure 12(c) which provides:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Statement of the Case

This case is a result of the United States and Howard L. Hoy, a Revenue Officer of the Internal Revenue Service filing a Petition to enforce an Internal Revenue Service Summons pursuant to I.R.C.P. 7402(b) and 7604(a). The Petitioner raised the issues of Fourth and Fifth Amendments to the Constitution of the United States and attorney/client privilege. The government made a Motion for Judgment on the Pleadings and a Resistance was filed thereto.

The government's Motion came on for hearing before the U.S. District Court and evidence was taken. The District Court for the Southern District of Iowa granted the Motion for Judgment on the Pleadings and ordered the production of the Respondent's proprietorship records (Appendix B, infra).

The Petitioner is an attorney admitted to practice in the State of Iowa, the U.S. District Court for the Southern District of Iowa, the Eighth Circuit Court of Appeals and the United Supreme Court. There is no dispute that Petitioner is a sole proprietor involved in the practice of law.

The Petitioner appeared in response to the Internal Revenue Service summons, but refused to deliver the documents and records of his sole proprietorship. He was summoned to appear for the second time, which he did, again refusing to furnish the documents and records of his sole proprietorship.

The Court of Appeals of the Eighth Circuit affirmed the Order of the District Court (Appendix "A", infra). The Court of Appeals said it was not prepared to apply the attorney/client

privilege to protect the wrong doing of the attorney. Further, the Court held the District Court's Order did not compel the Petitioner to do anything that has testimonial aspects or will implicate him in any criminal wrong doing, therefore his Fifth Amendment privilege is not violated by the District Court's Order. The Court also believed that the Fourth Amendment challenge to the District Court's Order was without merit. Finally the Court held that there are no factual disputes in enforcement proceedings, such as involved herein and therefore judgment on the pleadings was appropriate (Appendix "A", infra).

Reasons for Granting the Writ

The Court of Appeals for the Eighth Circuit by its decision, herein, has decided a federal question in conflict with the applicable decisions of this

Court; and thereby supports a Petition for Writ of Certiorari pursuant to U.S. Sup. Ct. Rule 17(1)(c), 28 U.S.C.A..

The government is seeking to acquire the Petitioner's papers and documents prepared by him as part of his law practice, a sole proprietorship.

This conduct has been expressly prohibited by the United States Supreme Court in the case of **Boyd v. United States**, 116 U.S. 616, 68 Sup. Ct. 524, 29 L. Ed. 746 (1886).

The Boyd rule has been recognized with approval in **United States v. Doe**, 465 U.S. 605, 104 Sup. Ct. 1237, 1245, 79 L. Ed. 552 (1984); **Fisher v. United States**, 425 U.S. 391, 96 Sup. Ct. 1569, 48 L. Ed. 2d 39 (1976); **Bellis v. United States**, 417 U.S. 85, 87, 94 Sup. Ct. 2179, 2182, 40 L. Ed. 2d 678 (1974).

It has also been recognized and

approved by the Eighth Circuit Court of Appeals in **United States v. G. & G. Advertising Co., et al**, 762 F. 2d 632, 634 (C.A. - 8th) (1985); **United States v. Harrison**, 653 F. 2d 359, 361 (C.A. - 8th) (1981).

The Boyd rule is that the records of a sole proprietorship are protected by the Fourth and Fifth Amendment to the United States Constitution, when the government seeks production of the same, from the sole proprietor. This rule is over a century old.

In the instant case, the Court of Appeals ignores and fails to note the Boyd decision in its opinion, or any of the recent affirmation of that rule in this Court's opinion.

It is respectfully submitted that the case at bar fits squarely within the boundaries of the Boyd rule protecting

the sole proprietor from the government in its attempt to seize books and documents belonging to him.

Clearly, the Court of Appeals has decided this case contrary to this Court's applicable decision in Boyd v. United States, 116 U.S. 616, 68 S. Ct. 524, 29 L. Ed. 746 (1886).

Fairness, justice and the law requires the Court of Appeals' ruling to be reversed; and the government prohibited from attempting to obtain the records of the Petitioner's sole proprietorship.

The Petitioner is a practicing attorney in the State of Iowa and as such is bound by the provisions of Sec. 622.10 Code of Iowa. Further, the Petitioner is required by Sec. 602.10112 to maintain "in violate the confidence and, at any peril to the attorney or counselor to perserve tne secret of a client . . ."

(emphasis added by this writer).

Confidential disclosure by a client to an attorney to obtain legal assistance is privileged, in the federal courts, **Fisher v. United States**, 425 U.S. 391, 403; 96 Sup. Ct. 1569, 1577; 48 L. Ed. 2d 39 (1976).

The Court of Appeals in the subject case does not mention the Iowa statutory provisions relating to confidentiality and attorney/client privilege and does not mention Fisher v. United States, 425 U.S. 391, 96 Sup. Ct. 1569, 48 L. Ed. 2d 39 (1976). In support of its decision, the Court of Appeals, cites only two of its decisions. Its opinion concludes the Petitioner ". . . is using the attorney/client privilege as a shield . . ." and "The attorney/client privilege was never intended to protect the wrong doing of the attorney . . .". These

conclusions are without any support in the record. They are contradictory to the Fisher decision. The confidentiality of the attorney/client privilege is to be maintained regardless of the desires of the attorney or the government, because it can only be waived by the client.

There is no dispute the government is trying to reach into the files of the Petitioner's clients. To reach information the government has no right to.

Last of all, the matter of the government's Motion for Judgment on the Pleadings pursuant to Fed. R.C.P. 12(c). The government claimed, in its Motion for Judgment on the Pleadings, there was no controversy between the Petition and the Answer; and there was no denial of the factual allegations contained in the Petition. The Resistance by Petitioner

clearly pointed out there was a controversy between the parties and a question of the attorney/client privilege, and ended by stating this was not proper for a Judgment on the Pleadings. Further, the Answer denied paragraphs 1, part of 2, 5, 9 and 10 of the Petition. In addition, there were affirmative declarations of the attorney/client privilege and protection under the Fourth and Fifth Amendment of the United States Constitution.

In considering a Motion for Judgment on the Pleadings, all the allegations in the Answer are assumed to be true and all contravening assertion in the Petition are taken to be false, National Metropolitan Bank v. United States, 323 U.S. 454, 65 Sup. Ct. 354, 89 L. Ed. 383 (1945); National Labor Relations Board v. Weirton Steel Co., 146 F. 2d 144 (C.A.

Third - 1944). In the Weirton Steel Co. case, the Court of Appeals stated at page 145, ". . . a court is without right to draw inferences favorable to a movant for summary judgment on pleadings. In that situation all reasonable intendments and inferences from the pleadings are, as a matter of law, to be taken against the movant and in favor of the opponent.".

A Motion for Judgment on the Pleadgings under F.R.C.P. 12(c) is just that, and does not contemplate the taking of evidence. Moreover, no notice was given that the Motion for Judgment on the Pleadings would be changed to a Motion for summary Judgment, as required under Rule 12(c). Of course, that would have required additional time and opportunity for both sides to present evidence by affidavit and a discussion of the factual controversies that existed, since a

summary judgment is not proper if there is a factual dispute.

Clearly, the government calling on a witness, in a hearing, held for argument under Rule 12(c), is inappropriate and outside the confines of that Rule. This testimony served no purpose for which Rule 12(c) was promulgated.

If one is to consider only the pleadings, pursuant to Rule 12(c), the Motion by the government should have been overruled. The District Court in hearing testimony, seeking evidence outside the confines of the hearing (the law clerk's call to Respondent), and drawing inferences in favor of the movant proceeded inappropriately, in violation of Rule 12(c).

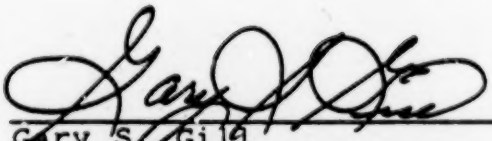
It is respectfully submitted the Court of Appeals support in upholding the District Court's action should be

reversed. In that, evidence was taken, no notice of evidence was given, and there were factual disputes, Rule 12(c) was inappropriate. Clearly, if evidence was to be taken the rules promulgated by this Court, contemplated anotner procedure other than a Motion for Judgment on the Pleadings. Again, this case should be reversed for the inappropriate use of Fed. R.C.P. 12(c).

Conclusion

The decision of the Court of Appeals for the Eighth Circuit are contrary to this Court's prior rulings and its rules. If the Court of Appeals is allowed to stand, it constitutes a reversal of Boyd v. United States, 116 U.S. 616, 68 Sup. Ct. 524, 29 L. Ed. 746 (1886), which has been the law in this country for over a century. The other decisions are also clearly against this Court's position.

This Petition for a Writ of Certiorari should be granted.



Gary S. Gill
Suite 614 Merle Hay Tower
Des Moines, Iowa 50310
Telephone: (515) 270-1143

PRO SE

Proof of Mailing Affidavit

I, Gary S. Gill, attorney and Petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that I on the 24th day of August, 1989, I deposited in a United States Post Office located at 4343 Merle Hay Road, with first class postage prepaid and properly addressed to the Clerk of the Supreme Court of the United States within the time allowed for filing the foregoing corrected Petition for Writ of Certiorari.

Gary S. Gill

Subscribed and sworn to before me at Des Moines, Iowa this ___ day of August, 1989.

VALARIE T. GILL
MY COMMISSION EXPIRES
Aug. 27, 1992

Notary Public in and for
the State of Iowa

Proof of Service

I, Gary S. Gill, attorney and Petitioner, herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 24th day of August, 1989 I served copies of the foregoing corrected Petition for Writ of Certiorari on the several parties thereto as follows:

1. On the United States by mailing 3 copies in a duly addressed envelope to John E. Bemer, Assistance United States Attorney for the Southern District of Iowa, E. 1st and Walnut Street, Des Moines, Iowa, 50309 and by mailing 3 copies in a duly addressed envelope to the Solicitor General, Department of Justice, Washington D.C., 20530.

Petitioner
Suite 614 Merle Hay Tower
Des Moines, Iowa 50310
Tele: (515) 270-1143

PRO SE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 88-2018

United States of America, and Howard L. Hoy, Revenue Office, Internal Revenue Service,	*	
Appellees,	*	Appeal from the United States
v.	*	District Court for the Southern
Gary S. Gill,	*	District of Iowa.
Appellant.	*	

Submitted: March 15, 1989

Filed: April 28, 1989

Before JOHN R. GIBSON, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and BEAM, Circuit Judge

---

PER CURIAM.

Gary Gill appeals an order of the

district court[1] which requires him to produce records relating to fee arrangements with his clients and client identities. This case was initiated by the Internal Revenue Service (IRS) as an enforcement proceeding to collect taxes owed by Gill.

Gill maintains that the information sought by the IRS is protected by the attorney-client privilege and disclosure of the information would violate his rights protected under the Fourth and Fifth Amendments to the United States Constitution. For the following reasons we affirm the order of the district court.

In In re Grand Jury Proceedings Subpoena to Testify to Wine, 841 F. 2d

---

[1]The Honorable Donald E. O'Brien, United States District Judge for the Southern District of Iowa.

230, 233 n. 3 (8th Cir. 1988), this court noted that "[a]bsent special circumstances, client identity and fee arrangements are not confidential professional communications protected by the attorney-client privilege." (citations omitted) See also In re Grand Jury Proceedings (85 Misc. 140), 791 F. 2d 663, 665 (8th Cir. 1986). An exception to this general rule is often applied when revealing a client's identity and the nature of the client's fee arrangements may implicate the client in the very criminal activity for which legal advice was sought. Wine, 841 F. 2d at 233 n. 3 (quoting United States v. Hodge & Zweig, 548 F. 2d 1347, 1353 (9th Cir. 1977). This is not the situation in the present case. Gill is using the attorney-client privilege as a shield to prevent the IRS from collecting taxes

that he and ~~his wife~~ owe for the years 1978-1984. The attorney-client privilege was never intended to protect the wrongdoing of the attorney and we are not prepared to apply the privilege to reach such a result in this case.

Gill also challenges the district court's order as a violation of the Fourth and Fifth Amendments. The district court properly noted that Gill's tax liability was determined by documents which he voluntarily prepared and submitted to the IRS. Gill admitted his tax liability but he now seeks to prevent the IRS from collecting these taxes. Since the district court's order does not compel Gill to do anything that has testimonial aspects or will implicate him in any criminal wrongdoing his Fifth Amendment privilege against self-incrimination is not violated by the

district court's order. Similarly, we believe that Gill's Fourth Amendment challenge to the district court's order is without merit.

Finally, Gill argues that the district court erred because it granted the IRS's motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). We disagree. In enforcement proceedings such as this where there are no factual disputes and the district court determines that the defense asserted by the respondent is not legally supportable, judgment on the pleadings is appropriate.

Accordingly, we affirm the order of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, et al,	)	
Plaintiff,	)	MISC. NO. 1-83-48
vs.	)	
GARY S. GILL,	)	
Respondent.	)	

This matter is before the court on petitioners' resisted motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). Two hearings were held on this matter on March 28, 1988 and on May 16, 1988. After full consideration, the court grants petitioners' motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c).

I. FACTS

This action was instituted by the petitioners to enforce a summons served upon respondent, Gary Gill, seeking

material described in the summons for the tax years 1978 through 1984. The respondent appeared as ordered on October 3, 1986, but failed to comply with the summons. Thereafter, a petition to enforce IRS summons was filed. An order to show cause was issued requiring respondent to show cause why he should not be compelled to obey the IRS summons. Respondent raised as defense to said order to show the attorney-client privilege and Fourth and Fifth Amendment protections.

II. ARGUMENT

A. Attorney-Client Privilege.

At the initial hearing, the court brought to the parties' attention the recent Eighth Circuit decision of In re: Grand Jury Proceedings Subpoena to Testify to: Donald A. Wine, No. 88-1019, and In re Grand Jury Proceeding Subpoena

to Testify to: Dale R. Luckow, No. 88-1119, filed March 4, 1988. In Wine and Luckow opinions, the Eighth Circuit, by way of footnote 3 on page 6, stated the following:

> Absent special circumstances, client identity and fee arrangements are not confidential professional communications protected by the attorney-client privilege. See, e.g., In re Grand Jury Proceedings (85 Misc. 140), 791 F. 2d 663, 665 (8th Cir. 1986) (client identity); United States v. Hodge & Zweig, 548 F. 2d 1347, 1353 (9th Cir. 1977). However, "[a] client's identity and the nature of that client's fee arrangements may be privileged where the person invoking the privilege can show that a strong probability exists that disclosure of such information would implicate that client in the very criminal activity for which legal advice was sought." United States v. HOdge & Zweig, 548 F. 2d at 1353, citing Baird v. Koerner, 279 F. 2d 623, 630 (9th Cir. 1960). Later Ninth Circuit cases have large limited the Baird v. Koerner exception to its facts.

In the present case, Mr. Gill has reported to the court that 10% to 15% of

his cases are criminal cases. Mr. Gill has not demonstrated that a "strong probability exists that disclosure of his clients' identity and the nature of his clients' fee arrangements would implicate said clients in any criminal activity." Therefore, the court finds that the identity and fee arrangements of Mr. Gill's clients are not confidential professional communications protected by the attorney-client privilege.

B. Fourth and Fifth Amendment Protections.

Respondent argues that his papers and documents prepared by him as part of his sole proprietorship of his law practice are protected from search and seizure by the Fourth and Fifth Amendments to the United States Constitution. See Boyd v. United States, 116 U.S. 616 S. Ct. 524, 29 L. Ed. 746 (1986); Fisher v. United

States, 425 U.S. 391, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976); United States v. Harrison, 653 F. 2d 359, 361 (8th Cir. 1981).

In United States v. Harrison, supra, defendant, Charles Harrison, appeared before the IRS agent as ordered, but refused to produce the documents as required. Harrison justified his refusal as an exercise of his Fifth Amendment privilege against compulsory self-incrimination. Although the Eighth Circuit found Harrison's argument to be without merit because he was acting as a trustee and not in his individual status, the court stated:

> The Fifth Amendment privilege, of course, protects against compulsory production of an individual's personal papers and effects as well as oral testimony. It is well established, moreover, that this privilege applies to the business records of sole proprietors or sole practitioners, as well as to documents of a purely personal

nature.

(Citations omitted).

In the instant case, Mr. Gill clearly would havethe right to assert the Fifth Amendment privilege against self-incrimination. However, the question is raised whether the records of Gill's fee arrangements with his clients would serve to incriminate him in any manner. The record indicates that Mr. Gill's tax liability was determined by the IRS from the tax forms filed by the respondent himself. Mr. Gill has admitted liability for the outstanding taxes. Therefore, Mr. Gill's contention that he is afforded protections by the Fourth and Fifth Amendments against search and seizure and self-incrimination are without merit.

IT IS THEREFORE HEREBY ORDERED that petitioners' motion for judgment on the

pleadings is granted.

IT IS FURTHER ORDERED that respondent shall comply with and obey the summons served upon him by appearing at the Internal Revenue Service Office, Room 450, One Corporate Place, 1501 42nd Street, West Des Moines, Iowa, before Revenue Officer Howard L. Hoy, or his designee, at 1:00 p.m. on the 30th day of June, 1988, then and there to testify and to produce for inspection and copying all of the books, papers, records and other data described in the summons, such appearances, testimony, inspection and copying to continue from day to day until complete.

June 22, 1988.

/S/ Donald E. O'Brien
Donald E. O'Brien, Judge
UNITED STATES DISTRICT COURT

Supreme Court, U.S.
FILED
OCT 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-358

In the Supreme Court of the United States

OCTOBER TERM, 1989

GARY S. GILL, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
SHIRLEY D. PETERSON
Assistant Attorney General
GARY R. ALLEN
CHARLES E. BROOKHART
WILLIAM A. WHITLEDGE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the courts below correctly rejected petitioner's contention that the enforcement of an IRS summons for the production of his business records would violate either the attorney-client privilege or his privilege against self-incrimination.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	3
Conclusion	5

TABLE OF AUTHORITIES

Cases:

Boyd v. *United States*, 116 U.S. 616 (1886)	3
Fisher v. *United States*, 425 U.S. 391 (1976)	4
Grand Jury Proceedings Subpoena to Testify to: Wine, In re, 841 F.2d 230 (8th Cir. 1988)	2, 4
United States v. *Davis*, 636 F.2d 1028 (5th Cir.), cert. denied, 454 U.S. 862 (1981)	4
United States v. *Doe*, 465 U.S. 605 (1984)	3
United States v. *Garden State Nat'l Bank*, 607 F.2d 61 (3d Cir. 1979)	4
United States v. *Hodge & Zweig*, 548 F.2d 1347 (9th Cir. 1977)	4
United States v. *Kis*, 658 F.2d 526 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982)	4

Constitution:

U.S. Const. Amend. V	2, 3, 4

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-358

GARY S. GILL, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 16-20) is unpublished, but the decision is noted at 881 F.2d 1079 (Table). The opinion of the district court (Pet. App. 21-27) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1989. The petition for a writ of certiorari was filed on July 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, an attorney who conducts his practice as a sole proprietorship, failed to pay his income tax liabilities for the years 1978-1984. The collection officer assigned to

collect those unpaid taxes issued an IRS summons to petitioner seeking a list of his accounts receivable and other documents reflecting petitioner's income, for the purpose of locating sources from which the outstanding liabilities could be collected. When petitioner refused to comply with the summons, the government filed this enforcement action in the United States District Court for the Southern District of Iowa. See Pet. App. 21-22.

The district court ordered the summons enforced, rejecting petitioner's blanket claims of attorney-client and Fifth Amendment privilege (Pet. App. 21-27). The court found that the identities of petitioner's clients and the amount of the fees they had paid were not "confidential professional communications protected by the attorney-client privilege" (*id.* at 24). The court explained that this information typically is not protected by the privilege unless it is shown that " 'a strong probability exists that disclosure of his clients' identity and the nature of his clients' fee arrangements would implicate said client in any criminal activity' " (*ibid.*, quoting *In re Grand Jury Proceedings Subpoena to Testify to: Wine*, 841 F.2d 230, 233 n.3 (8th Cir. 1988)). Petitioner's mere assertion that 10%-15% of his cases are criminal was not sufficient to establish a strong probability that disclosure of the information would reveal a confidential communication. Pet. App. 23-24. The court also found that production of the summoned financial records would not incriminate petitioner (*id.* at 24-26). The court explained that petitioner's "tax liability was determined by the IRS from the tax forms filed by the [petitioner] himself" and that he had admitted liability for the outstanding taxes (*id.* at 26).

2. The court of appeals affirmed (Pet. App. 16-20). The court agreed with the district court that there were no unusual circumstances present here that would warrant a departure from the general rule that client identity and fee arrangements are not confidential communications pro-

tected by the attorney-client privilege. Rather, the court concluded that petitioner "is using the attorney-client privilege as a shield to prevent the IRS from collecting taxes that he and his wife owe" (*id.* at 18-19). The court of appeals also rejected petitioner's assertion of the Fifth Amendment privilege against self-incrimination. Noting that petitioner had admitted his tax liabilities for the years under investigation on documents "which he voluntarily prepared and submitted to the IRS," the court of appeals concluded that the summons enforcement order did not compel him to "do anything that has testimonial aspects or will implicate him in any criminal wrongdoing" (*id.* at 19).

ARGUMENT

1. The court of appeals correctly found that the summons did not implicate petitioner's Fifth Amendment privilege against self-incrimination because his act of producing his business records had little testimonial significance and would not implicate him in any criminal wrongdoing (Pet. App. 19). Petitioner does not dispute that compliance with the summons would not tend to incriminate him; rather, his contention appears to be that the records of his sole proprietorship are private papers that are per se protected by the privilege under *Boyd* v. *United States*, 116 U.S. 616 (1886). See Pet. 3-6. This Court, however, has clearly rejected the view that the Fifth Amendment automatically protects an individual's private papers from a government request for production. Rather, the privilege protects only the testimonial aspects of the act of producing documents and not the contents of the documents themselves; any suggestion to the contrary in *Boyd* has been repudiated. *United States* v. *Doe*, 465 U.S. 605, 610 n.8 (1984); see generally *id.* at 610-613. Moreover, as the court of appeals noted (Pet. App. 19-20), petitioner raised the privilege merely to impede

the IRS's ability to collect taxes from him, not out of a fear that the records would incriminate him. Clearly, therefore, he did not raise a valid Fifth Amendment claim. See *Fisher* v. *United States*, 425 U.S. 391, 399 (1976).

2. There is no merit to petitioner's contention (Pet. 6-8) that enforcement of the summons would infringe the attorney-client privilege. It is well established that the attorney-client privilege does not generally protect the identity of a client or fee information. See *In re Grand Jury Proceedings Subpoena to Testify to: Wine*, 841 F.2d 230, 233 n.3 (8th Cir. 1988); *United States* v. *Davis*, 636 F.2d 1028, 1033-1034 (5th Cir.), cert. denied, 454 U.S. 862 (1981); *United States* v. *Hodge & Zweig*, 548 F.2d 1347, 1353-1354 (9th Cir. 1977). Petitioner does not suggest that there are any unusual and special circumstances present in this case that would make such information subject to the privilege. Here, the summons sought only ordinary business records of petitioner's practice, and not, as petitioner asserts (Pet. 8), his client files. Accordingly, the privilege that protects confidential communications between attorney and client made for the purpose of seeking or giving legal advice is not implicated by the summons in this case.

3. Petitioner also errs in contending (Pet. 8-12) that the district court should have held a hearing to resolve the merits of his claims of privilege. The general rule in summons enforcement cases is that, in order to be entitled to a hearing, the summoned party must raise issues of fact, supported by affidavit, sufficient to cast doubt upon the enforceability of the summons. See, *e.g.*, *United States* v. *Kis*, 658 F.2d 526 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982); *United States* v. *Garden State Nat'l Bank*, 607 F.2d 61, 69-72 (3d Cir. 1979). As the court of appeals stated (Pet. App. 20), "[i]n enforcement proceedings such as this where there are no factual disputes and the district court determines that the defense asserted by the respondent is not legally sup-

portable, judgment on the pleadings is appropriate." Here, petitioner failed to provide any factual basis for his claims of privilege or any other ground for denying the summons enforcement petition. Accordingly, the district court acted well within its discretion in enforcing the summons on the record before it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
SHIRLEY D. PETERSON
Assistant Attorney General
GARY R. ALLEN
CHARLES E. BROOKHART
WILLIAM A. WHITLEDGE
Attorneys

OCTOBER 1989

☆ U.S. GOVERNMENT PRINTING OFFICE 1989—262 203/00575